but is reached by a much different and far more obscure route. The Petitioners in No. 71-691 apparently believe that the adoption of a new Constitution by Illinois somehow had the effect of narrowing the scope of the 14th Amendment to the United States Constitution. Furthermore, these Petitioners persist in advancing in this Court a frivolous argument with regard to the construction of Article IX-A, — an argument which was decisively rejected by the Illinois Supreme Court and which involves no conceivable federal question.[3]

The Cook County defendants have as yet filed no response to Lake Shore's Jurisdictional Statement, and have not replied to the *Maynard* Motion to Strike.

(5). The final group of litigants consists of the "plaintiffs" in *Shapiro* v. *Barrett*, namely, Clemens K. Shapiro, Jerome Herman, d/b/a The Spot, Guy S. Ross and Eugene D. Ross, d/b/a Guy S. Ross & Co., a partnership, and M. Weil and Sons, Inc., an Illinois corporation. None of these parties has sought review in this Court, nor have any of them filed responses to Lake Shore's Jurisdictional Statement or to either of the Petitions for Certiorari.

II.

With respect to the Petition for Certiorari filed by the Attorney General (No. 71-685), it is Lake Shore's position that the federal constitutional issue therein raised is undoubtedly a substantial one, — but one, nevertheless, that has been well settled by prior decisions of this and

[3] The reference is to the argument that Article IX-A should be construed so as to prohibit only the taxation of *non-business* personal property. Such an interpretation would avoid the constitutional difficulty inasmuch as the classification would be based on the nature or use of the property itself, rather than upon the character of the owner.

other courts. This Court, therefore, should deny certiorari. The controlling authorities are lucidly and succinctly discussed at pages 8 through 15 of the Consolidated Motion to Strike and Brief in Opposition filed by the *Maynard* plaintiffs.

A decent respect for the realities of the situation nonetheless compels Lake Shore to recognize that this Court may be reluctant to note probable jurisdiction in Lake Shore's appeal while at the same time denying the writ of certiorari being sought by prominent public officials, — including the Governor of Illinois in the form of a brief *amicus curiae*. If that is so, then Lake Shore would be well enough satisfied if this Court should see fit to grant the Petition in No. 71-685, while at the same time noting probable jurisdiction of Lake Shore's appeal.

The substantial federal question raised by the Petition in No. 71-685 perhaps ought to be re-examined and discussed in the light of changing conditions and newly emerging concepts of equal protection of the laws. Lake Shore remains confident that this Court, after hearing full argument, will reaffirm its prior holdings on the issue and vindicate the soundness of the seminal analyses by Justices Field and Sawyer in the *California Railroad Tax* cases.[4]

The third possibility, of course, is that this Court will grant either or both of the Petitions for Certiorari while at the same time declining to hear Lake Shore's appeal. In that event, for reasons already noted in Lake Shore's Jurisdictional Statement (pages 13-14), Lake Shore will

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[4] *San Mateo County* v. *Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dism. 116 U.S. 138; and *Santa Clara County* v. *Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grnds., 118 U.S. 394.

in all likelihood ask leave of Court to withdraw its appearance in both certiorari proceedings and permit the cause to be heard *ex parte*.

III.

As to the Petition for Certiorari filed in the *Shapiro* case by the Cook County taxing officials (No. 71-691), Lake Shore respectfully urges this Court to deny certiorari. Each of the Petitioners in that case is also a party to the *Lake Shore* case and will have adequate opportunity to present his views in the event that this Court notes probable jurisdiction in No. 71-674 and/or grants the writ in No. 71-685. Permitting a separate review of the *Shapiro* case can serve no useful purpose, and will tend only to obfuscate the real issues.

Furthermore, it is readily apparent from the record, and particularly from the complaint filed therein and the order of the trial court (reproduced at p. A 33 of the Amended Petition for Certiorari in No. 71-685), that *Shapiro* v. *Barrett* does not constitute a "case" or "controversy" within the meaning of Article III, Section 2 of the Constitution of the United States: *Chicago & G. T. Ry. Co.* v. *Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402 (1892); *Liverpool, New York & Philadelphia Steam-Ship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355 (1885); *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962); *United States* v. *Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 554 (1961), reh. den. 365 U.S. 875, 81 S.Ct. 899 (1961); Cf. *Flast* v. *Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968); *Jenkins* v. *McKeithen*, 395 U.S. 411, 423, 89 S.Ct. 1843, 1849 (1969), reh. den. 396 U.S. 869, 90 S.Ct. 35 (1969); *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 151, 90 S.Ct. 827, 829 (1970).

CONCLUSION

For the foregoing reasons Lake Shore Auto Parts Co., ppellant in No. 71-674, and Respondent in Nos. 71-685 d 71-691, respectfully requests that this Court deny e Petitions for Certiorari in Nos. 71-685 and 71-691, ile at the same time noting probable jurisdiction in . 71-674. In the alternative, Lake Shore requests that s Court grant Certiorari in No. 71-685 and also note obable jurisdiction in No. 71-674.

Respectfully submitted,

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INDEX

IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

CONSOLIDATED MOTIONS TO STRIKE AND BRIEFS IN OPPOSITION OF EDWARD J. BARRETT, ET AL., (PETITIONERS IN CASE NO. 71-691) IN CASES NOS. 71-674 AND 71-685

I.

MOTION OF EDWARD J. BARRETT, ET AL., PETITIONERS IN CASE NO. 71-691, TO STRIKE AND DISMISS THE APPEAL AND THEIR BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED BY LAKE SHORE AUTO PARTS CO. IN CASE NO. 71-674.

Petitioners here were defendants-appellants in the Supreme Court of Illinois in the case of *Lake Shore Auto Parts Co.* v. *Bernard J. Korzen, et al.*, that Court's Docket No. 44199.

These petitioners, in their original brief, urged the Illinois Supreme Court as follows:

"ARGUMENT

I.

"THE COURT ERRED IN HOLDING THAT ARTICLE IX-A "AMENDED" THE REVENUE ACT OF 1939, AND THAT AS A RESULT OF SUCH "AMENDMENT," THAT ACT, "AS SO AMENDED," VIOLATED THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE IT THEN DENIED TO PLAINTIFF THE EQUAL PROTECTION OF THE LAW THEREIN GUARANTEED.

"Plaintiff does not assail or challenge the validity or constitutionality of Article IX-A. Indeed, plaintiff declares, in its brief in support of its motion for summary judgment, that it "most emphatically does not seek to have Article IX-A declared unconstitutional in any respect whatsoever." (Pl. Br., p. 1).

The entire cause of action upon which plaintiff predicates its complaint, is the charge that "It is only the existing revenue statute, as that statute is amended by Article IX-A, which plaintiff claims to be a violation of the equal protection clause of the Federal Constitution . . ." (Emphasis supplied.) (Pl. Br., p. 3), because that statute as so amended results in the arbitrary and unreasonable "exemption" of "individuals" while "retaining" the personal property tax on plaintiff.

Plaintiff cites not one authority for the premise advanced by it, and accepted by the court, that Constitutions, be they Federal or State, 'amend" statutes which are in variance with, or conflict with provisions of those Constitutions.

The reason for such absence of authority seems clear. There are none.

To the contrary, the Constitution itself establishes the exclusive manner by which statutes are permitted to be "amended" in this State. Article IV, Section 12, and Section 13, declares with specificity, the manner in which bills may be altered or amended, and the procedure required to accomplish such alteration or amendment.

Sections 12 and 13 of Article IV are set out in their entirety in the Appendix attached hereto. Statutes in the State of Illinois, by constitutional fiat, can only be amended by the enactment of amendatory statutes.

Article IX-A neither disturbs nor effects the exclusive direction of Sections 12 and 13 of Article IV. The court below overlooked this most significant fact. The decision of the court below necessarily, albeit tacitly, ignores the direct declaration of Article IV, that, in Illinois, statutes are amended in the manner and by the method established in that Article, and in no other way. The court committed serious and fatal error by such oversight. The court should so hold.

Further, plaintiff itself, although urging the premise that constitutional provisions "amend" statutes, submits as authority for that proposition, cases which declare that "The rule is well established that an existing statute which is in conflict with a newly adopted constitutional provision is rendered void and unenforceable, precisely as would be the case with a newly enacted law in conflict with a pre-existing constitutional requirement". (Pl. Br., p. 3).

The difference between a Constitution "amending" a statute and "rendering void" a statute is not a distinction predicated upon mere exiguous metaphysics. The difference is significant and decisive here, and its discernment demon-

strates, without more, the error founding the judgment below.

Defendants are in complete accord with plaintiff that the rule is well established that a statute, in conflict with a constitutional provision is, as a result of such conflict, thereby rendered void and unenforceable. That well established rule is the very crux of this case, and destructive of plaintiff's entire cause of action.

There is no question but that a constitution, or any provision thereof, simply does not "amend" a statute or any provision of that statute.

The Constitution of the State of Illinois is the supreme law of this State. People v. Hotz, (1927) 327 Ill. 433. That being so, all acts of the citizens of the State of Illinois, all statutes passed by the General Assembly of this State, and all statutes passed by the General Assembly of this State, and all judicial determinations are scrutinized in the light of the Constitution of this State. All of such conduct, acts, or determinations are either permitted by, authorized by, or are offensive to or prohibited by the Constitution. All are either constitutional or unconstitutional.

This court in Fiorito v. Jones, 39 Ill. 2d 531, held unconstitutional the 1967 amendments to the Service Occupation Tax and related Tax Acts. Prior to those amendments, the Service Occupation Tax Act imposed a tax upon "all persons engaged in the business of making sales of service. . . ." The 1967 amendments limited the application of the service occupational taxes to "sales of service" by only four specifically enumerated categories of servicemen. In that case, the court said, ". . . It is apparent that the basic question determinative of all the constitutional objections advanced here is whether a reasonable difference exists between the four sub-classes specifically

subjected to taxation by the amended Service Occupation and Service Use Tax Acts and those sub-classes impliedly and expressly exempt from taxation." (p. 536). This court held the 1967 amendments to be unconstitutional in their entirety, thereby rendering void, as well, the repealing sections contained in those amendatory acts.

This court made it clear by such declaration that if statutes or provisions in statutes conflict with the Constitution of this State, the result of such contrariness renders those statutes, or the provisions assailed in those statutes, void ab initio.

Again, and just recently, this court had occasion to iterate this well established law. In Van Driel Drug Stores, Inc. v. Mahin, 265 N.E. 2d 659 (Sept. 1970), this court said:

> "While it is true that when House Bill 2482 was adopted subsequent to House Bill 257, the former appeared to have repealed the latter by implication, the question remains as to what effect declaring House Bill 2482 unconstitutional has on House Bill 257. In People ex rel. Barrett v. Sbarbaro, 386 Ill. 581, 590, the court stated: 'An invalid law is no law at all. It confers no rights and imposes no duties. [Citation.] The effect of the enactment of an invalid amendment to a statute is to leave the law in force as it existed prior to the adoption of such amendment.' In People v. Schraeberg, 347 Ill. 392, the court found that an unconstitutional law 'confers no right, imposes no duty and affords no protection. It is in legal contemplation as though no such law had ever been passed. [Citation.]' When House Bill 2482 was declared unconstitutional in Fiorito, it was void ab initio. (See Quitman v. Chicago Transit Authority, 348 Ill. App. 481.) It was at that point wholly inoperative as though it had never been passed, and therefore could not repeal House Bill 257." (p. 661)

In applying these principles to the instant case, it is apparent that the effect of Article IX-A, which prohibits the taxation of personal property by valuation as to individuals, is to make imposition of such tax unconstitutional in Illinois.

Therefore, any statute, or any provision or portion of any statute in existence in the State of Illinois on that date, which purports to, or attempts to impose such tax is unconstitutional. That being so, any provision of any statute which imposes such tax is void, ab initio, and is considered in legal contemplation as though it never had been in existence.

Emergent then is the perception that the Revenue Act of 1939 is not "amended" so as to "exempt" individuals from the imposition of personal property tax. The Illinois Revenue Act of 1939, as a result of Article IX-A, is considered in law not to impose such tax on "individuals" because "individuals" do not appear there as subjects upon whose personal property that tax is imposed. Conversely apparent from the above authority, the Revenue Act of 1939, as a result of Article IX-A, imposes the tax provided in that Act only on the personal property of persons other than "individuals."

It can be no other way. Individuals cannot be included within the circumference of that act because Article IX-A declares such tax on the personal property of "individuals" to be unconstitutional in Illinois. That being so, it, of course, becomes eminently apparent that the General Assembly of this State could not enact an amendment to the Revenue Act of 1939 to include "individuals" within the imposition of that tax because Article IX-A makes it unconstitutional to impose such tax; neither can plaintiff include individuals in that act, and neither can the court

below, because the imposition of such tax is prohibited and any attempt to do so by enactment or by judicial declaration would be void.

The Revenue Act of 1939, subsequent to January 1, 1971, imposes that tax, and provides for its imposition only upon all non-individuals, be they corporate or non-corporate entities.

As demonstrated above, the effect of such prohibition in Article IX-A being to deny the very existence of any language whatsoever purporting to impose such tax, therefore, there is not one word in the entire length and breadth of the Revenue Act of 1939, which indicates or implies the application of that act to "individuals."

The conclusion necessarily emerging from these observations, is that there simply is no Revenue Act of 1939, "as amended", in existence at all, let alone capable of offending anything because of such "amendment."

Article IX-A has removed individuals and their personal property from imposition of the tax in the Revenue Act by erasing from that Act all reference to "individuals." In legal contemplation that Act is required to be read as if "individuals" and all reference thereto, is without existence there. This is the effect of Article IX-A which declares the imposition of such tax by that Act unconstitutional, and prohibits the inclusion in that Act of individuals for purposes of the tax there imposed.

Defendants respectfully submit that the foregoing amply demonstrates that no discrimination against plaintiff, or invalid or unreasonable classification between plaintiff and "individuals," is capable of emergence from the Revenue Act of 1939 because that act applies solely and exclusively to persons other than "individuals." That Act does not contain any class such as "individuals." A fortiori, it is

impossible for that Act "to be amended" so as to "exempt" individuals "while retaining" that tax on persons other than "individuals." The court erred in holding to the contrary. That error compels this court's order of reversal.

II.

THERE BEING NO REVENUE ACT "AS AMENDED" BY ARTICLE IX-A, PLAINTIFF'S ACTION PREDICATED ENTIRELY ON SUCH EXISTENCE FAILS, AND THE COURT ERRED IN NOT SO HOLDING.

Plaintiff's entire cause of action is predicated upon the existence of "an amended" Revenue Act of 1939. The trial court not only accepted plaintiff's premise but so found and so held. There is no Revenue Act of 1939 "as so amended". A fortiori plaintiff's case predicated upon such premise fails. The cause of action upon which plaintiff predicated its case is nonexistent. Nonexistence of a cause of action denies the existence of grounds for relief predicated thereupon.

Plaintiff's cause of action is asserted by plaintiff, and held by the court, to arise solely from, and is predicated exclusively on the ground that the Revenue Act of 1939 "as amended" by Article IX-A to "exempt" individuals from the class upon which that Act imposes that tax, by such amendment occasions the discrimination against plaintiff upon whom that Act continues to "retain" that tax.

The fallacy in that syllogism, apparent from the exposition heretofore, is fatal to plaintiff and the judgment of the court. The major premise engendering the erroneous conclusion reached by the court is denied by the law. There is no Revenue Act of 1939 as amended. There is no ground upon which plaintiff's action finds support. Plaintiff pre-

sents no cause of action cognizable under the law to permit its entertainment by the court. The relief plaintiff seeks is the declaration by the court that judgment be entered in favor of plaintiff. The very statute, pursuant to which plaintiff instituted its action, demands as a condition of its invocation that a "cause" of action exist which affords grounds to support that action, thereby providing the basis necessary before the court's declaration can be enlisted. (Declaratory judgment act, ch. 110, section 57.1, Ill. Rev. Stat. 1969).

The court erred in adopting plaintiff's premise that the law permits recognition of the principle, advanced by the plaintiff, that statutes, declared by constitutional provisions to be prohibited, are thereupon considered under the law to "be amended" by such constitutional prohibition. Whereupon the court further erred in considering that the construction of those statutes "as so amended" invokes application of those principles of law pertinent to conflicts or variances found to exist between statutes and subsequently enacted amendatory statutes.

The Revenue Act of 1939, not having been amended by Article IX-A, invokes none of the principles pertinent to consideration of questions arising between statutes and amendatory statutes. The court erred in not so holding. The court erred in the application of those principles to the instant matter.

Plaintiff denies its cause of action is founded in law on the ground that Article IX-A is offensive to Illinois Constitution, and plaintiff denies its cause of action is founded on any offensiveness of Illinois Constitution, as amended by Article IX-A, to the Constitution of the United States.

Plaintiff predicates its entire cause of action, and sought and obtained the court's declaration that plaintiff was en-

titled to relief predicted on a cause of action which requires for its existence the concept that the Revenue Act of 1939, as amended by Article IX-A, offends the Constitution of the United States.

Defendants respectfully submit the non-existence of that cause of action. The court committed palpably reversible error in finding such cause of action existed and upon the existence of which plaintiff was entitled to relief. This court should so hold." (Brief of defendants-appellants, pp. 7-15)

These petitioners, again, in their reply Brief, addressed the attention of the Illinois Supreme Court to the following facts and made the following arguments:

"II.

"LAKE SHORE PLAINTIFF RESPONDING AS APPELLEE TO THE BRIEF OF THESE DEFENDANT-APPELLANTS IN THIS CASE, FAILS TO RESPOND TO THE CHARGE BY THESE DEFENDANTS-APPELLANTS THAT LAKE SHORE PLAINTIFF'S COMPLAINT IS FATALLY DEFECTIVE FOR LACK OF THE ESTABLISHMENT OF A LEGALLY COGNIZABLE CAUSE OF ACTION AND THAT THE DECISION BY THE TRIAL COURT PREDICATED UPON THE VALIDITY OF SUCH CAUSE OF ACTION NECESSARILY MUST FALL. LAKE SHORE PLAINTIFF, IN THE ABSENCE OF DENIAL, IS PRESUMED TO ADMIT THIS CHARGE. THIS COURT IS COMPELLED TO ENTER ITS ORDER OF REVERSAL AND DISMISSAL.

Points I and II of the Argument in the brief of these defendants-appellants in their appeal from the order of the trial court in this case (Lake Shore Auto Parts Co.

v. Korzen, this court's No. 44199) demonstrate; and these defendants-appellants urge there at length, that the trial court committed grievous and reversible error for the reason that plaintiffs patently had failed to establish a cause of action and particularly a cause of action upon which the court could predicate grounds for, and upon the existence of which it could grant, the relief there sought. Which cause of action was found to exist by that court, and the propriety and validity of which was relied upon by that court to entitle plaintiffs to the relief granted by that court.

This court unvaryingly, without exception, and correctly, under the law, pursuant to the requirements of the law and the Rules of this Court, has insisted that issues raised by parties before it, require response by the parties effected by the presence of those issues, and that the absence of such response compels this court to presume that such position is well taken, and the decisiveness of such position is admitted by absence of its denial.

The admission by Lake Shore plaintiff here disposes of that case before this court. These plaintiffs respectfully request the entry by this court of its order finding the issue in favor of these defendants, reversing the order appeal from, and directing the dismissal of that case." (Reply brief, pp. 7-8)

These petitioners, for the foregoing reasons, urged the Supreme Court of Illinois to dismiss the complaint filed by Lake Shore for failure of that complaint to state a cause of action. The Supreme Court of Illinois did, indeed, reverse and remand Lake Shore with directions to the trial court to dismiss the complaint filed therein. (Op. Ill. Supr. Ct., last page).

It is exquisitely apparent that the judgment of the Supreme Court of Illinois in the Lake Shore case is based

upon an adequate and independent non-Federal ground. Such being true, the judgment of the Illinois Supreme Court in Lake Shore is non-reviewable by this Court.

These petitioners respectfully submit that the appearance of this fact in the Lake Shore case comes directly within the comprehension of, and needs no further demonstration other than this Court's pronouncement in *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6. There this Court, rejecting review under such circumstances, stated:

> " . . . 'The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion". *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6.

So firm is this principle that, where a case has been accepted for review and an adequate state ground becomes apparent only after oral argument, the writ of certiorari will be dismissed as improvidently granted. *Wilson* v. *Loew's Inc.*, 355 U.S. 597.

For this reason alone, the alternative appeal and petition for certiorari filed by Lake Shore is improvident, and should be dismissed and denied.

But there is a further and independent reason why Lake Shore's alternative petition should be denied.

Nowhere in Lake Shore's jurisdictional statement, or in its petition for writ of certiorari, does Lake Shore object to, oppose or assign as error, the judgment of the Illinois Supreme Court dismissing the complaint filed by Lake Shore. Significantly, Lake Shore's ambivalent petition is totally absent any disagreement whatsoever with the judgment entered by the Illinois Supreme Court dismissing Lake Shore's complaint for the reason that no cause of action was found by the Illinois Supreme Court to emerge therefrom. This is fatally defective to Lake Shore's position before this Court.

Petitioners respectfully submit that either of the foregoing reasons, and certainly both, compel the entry by this Court of its order dismissing the appeal filed by Lake Shore and denying the writ of certiorari it seeks this Court to issue.

II.

MOTION OF EDWARD J. BARRETT, ET AL., TO STRIKE AND DISMISS THE CONSOLIDATED MOTION TO STRIKE AND BRIEF IN OPPOSITION TO CASES NOS. 71-674, 71-685, 71-691 OF RESPONDENTS, EUGENE L. MAYNARD, PROVISO TOWNSHIP HIGH SCHOOL DISTRICT NO. 209, BELLWOOD GRADE SCHOOL DISTRICT NO. 88, CICERO GRADE SCHOOL DISTRICT NO. 99, AND RIVER GROVE GRADE SCHOOL DISTRICT NO. 85½, ALL IN COOK COUNTY, ILLINOIS.

Maynard, Ill. Docket No. 44308, appeared before the Illinois Supreme Court upon leave granted by that court to file that suit in that court as an original action for declaratory judgment. These petitioners were respond-

ents-defendants there. The petitioners-plaintiffs in that case urged that Article IX-A discriminated unconstitutionally against corporations and prayed for the reimposition of the personal property tax on individuals as that tax was so imposed prior to its removal by the People of the State of Illinois in the Referendum held November 3, 1970, in which referendum the overwhelming majority of the voters of that State declared its prohibition.

These petitioners urged the Illinois Supreme Court to dismiss that complaint for want of capacity of those particular plaintiffs to maintain that action.

In that case, these petitioners contended to the Supreme Court of Illinois as follows:

"ARGUMENT

I.

"THE PLAINTIFFS ARE WITHOUT STANDING TO ASSAIL THE CONSTITUTIONALITY OF ARTICLE IXA OF THE ILLINOIS CONSTITUTION OF 1870.

"Plaintiffs, Proviso Township High School District No. 209, Bellwood Grade School District No. 88, Cicero Grade School District No. 99, and River Grove Grade School District No. 85½, are governmental bodies in the County of Cook, State of Illinois, and are not subject, in any way whatsoever, to the imposition of personal property tax under, or by virtue of, or as a consequence of the adoption of Article IXA, nor will they be, nor can they be, by any decision rendered by this Court. In fact, these plaintiffs, not only under Article IXA, but even prior to its adoption, were *never* subject to the imposition of personal property tax.

The plaintiff, Eugene L. Maynard, is a natural person, none of whose personal property is owned or used in the operation of a business, or for any business purpose, and all of which property is owned and used for his person enjoyment and that of his family.

As such, he is an "individual" within any conceivable meaning of that word as it appears in Article IXA of the Illinois Constitution of 1870. As such "individual" Mr. Maynard was relieved of the burden of personal property taxation by the adoption of Article IXA as were all other such individuals similarly situated.

There is not one party litigant in the cases consolidated by order of this Court (Lake Shore, Maynard, Shapiro) who urges, contends, or implies that plaintiff Maynard is subject to the tax prohibited by Article IXA. To the contrary, all parties litigant, independently of each other and in concert, admit, agree and concede that Article IXA prohibits and makes unconstitutiinal the imposition of that tax on plaintiff Maynard and all other members of his class.

Further, *neither* of the Cook County Circuit Courts, either in Lake Shore or in Shapiro, hold plaintiff Maynard and members of his class subject to that tax. To the contrary, both decisions by those courts hold that personal property owned by natural persons and used by them for their own personal use and enjoyment and that of their families is not subject to the imposition of personal property tax.

Neither the Cook County defendants nor the defendant the State of Illinois, in any of these proceedings, at any time, have ever alleged or contended that Article IXA or the effect of Article IXA, or any consequence ensuing from Article IXA, in any way subjects could or would subject, plaintiff Maynard and members of his class to the imposition of the tax prohibited by Article IXA.

No such issue is before this Court in any of the three cases now before it. No such issue appears in the cases (Lake Shore and Shapiro) on appeal to this Court.

No such issue appears in the instant original action filed by Maynard in this Court. No such issue apears here for the reason that neither these defendants, nor the State Department have imposed, are imposing, have sought to impose, seek to impose, or threaten to impose such a tax on plaintiff Maynard; nor on plaintiffs school districts.

INDEED, NOWHERE HERE DO ANY OF THESE PLAINTIFFS ALLEGE OR CONTEND THAT, EITHER AS A RESULT OF ARTICLE IXA OR BY ANY ACTION, PRESENT OR FUTURE, OF THESE DEFENDANTS HAS ANY INJURY TO THEM BEEN OR WILL BE OCCASIONED.

Plaintiffs' action filed as an original action in this Court is one for declaratory judgment. The Act governing those actions expressly requires the existence of "an actual controversy". The entertainment of such proceedings is discretionary with the Court. Illinois Revised Statutes, 1969, Chapter 110, section 57.1. Plaintiffs recognize the essentiality of the existence of an "Actual controversy to the viability of their cause of action".

Plaintiffs recognize this requisite in the following fashion:

> "In the presence of an actual controversy, the plaintiffs say . . .
>
> [Maynard Brief p. 2]

However, this constitutes the full extent of plaintiffs' contribution to the stature of the "actuality" and the "controversy" demanded. Nowhere, do the plaintiffs allege anything beyond this token recognition; or in demonstration of action or conduct, the

result of which has injured or will wrong these plaintiffs.

They have not, because indeed, they cannot. As demonstrated above, the plaintiffs enjoy complete immunity from imposition of personal property taxes; and these defendants and all parties to this litigation argue that they continue to enjoy this immunity and that this Court should so hold.

None of the plaintiffs in this action are subject to personal property tax, yet they assail the very provision which relieves one of them of the burden, asserting that the provision is "vague" and establishes "a system of class violative of the equal protection and the due process clauses of the United States Constitution". It is axiomatic that a party may not be heard to claim a constitutional protection unless he belongs to a class for whose sake the constitutional protection was given. People ex rel. Hatch v. Reardon, 204 U. S. 152, 160 (1907). The protection given is to those who must continue to pay a tax while others, similarly situated, are excused. Persons who have never paid a tax are without standing to assail a provision which relieves some persons of that tax burden; former taxpayers who have been relieved and attack the relieving provisions, lack gratitude and a rational concern for their own purse as well.

In summation, nowhere do these plaintiffs allege or charge that the defendants have assessed, are assessing, threaten to assess, or intend to assess personal property tax on the property owned by the plaintiffs. Nor, do they allege or charge that the plaintiffs threaten or intend to compel payment of any such tax. There is, therefore, no cause or controversy. The court should dismiss this complaint". (Brief of County Defendants, pages 4 through 7).

The Illinois Supreme Court dismissed the *Maynard* complaint. The order of that court, in full, is as follows:

"And now, on this day, the Court having diligently examined and inspected as well the complaint for declaratory judgment filed by petitioners and the pleas and the Motion by respondents to dismiss the complaint, and being fully advised of and concerning the premises, are of the opinion that the said complaint is not well taken.

THEREFORE, it is considered and ordered by the Court that the said complaint be and the same is hence dismissed".

Here, as well, Maynard *et al.* are without standing before this Court for the same reasons heretofore assigned by petitioners to apply to Lake Shore petitioner.

This fatal impediment seemingly appears to be understood by Maynard, *et al.* to negate a successful petition to this Court to issue its writ of certiorari to the Illinois Supreme Court from the judgment it entered against Maynard, *et al.* Indeed, Maynard, *et al.* has filed no petition for a writ of certiorari.

Misunderstood, however, by Maynard, *et al.*, is the fact that such foreclosure equally forecloses them from any access to this Court in any capacity whatsover, particularly in the capacity in which they seek to impress themselves into the proceedings before this Court by way of the consolidated motion filed by them.

These petitioners respectfully submit that Maynard, *et al.* lack any capacity whatsoever before this Court in this proceeding. This Court should so hold.

III.

BRIEF OF EDWARD J. BARRETT, ET AL., IN OPPOSITION TO THE AMENDED PETITION FOR WRIT OF CERTIORARI FILED BY ROBERT J. LEHNHAUSEN IN CASE NO. 71-685.

Although, these petitioners, in their petition for writ of certiorari in *Barrett, et al.* v. *Shapiro, et al.*, Case No. 71-691, defined the posture of each of the three cases which were consolidated by the Illinois Supreme Court, and have demonstrated there (Pet. for certiorari, Pages 14-16) that of those three cases, only the *Shapiro* case (Illinois Docket No. 4432) was decided by the Illinois Supreme Court on the merits, while in each of the other two cases the Illinois Supreme Court dismissed each of the complaints in each of those cases for the reasons heretofore assigned, yet, the petition for the writ of certiorari filed by petitioner Lehnhausen is not addressed to the issuance by this Court of its writ of certiorari to review the judgment entered in the *Shapiro* case. This is eminently clear, not merely from the caption of the Lehnhausen petition but throughout the entire context of that petition.

This being true, Lehnhausen's petition for certiorari is subject to the same fatal defectiveness heretofore demonstrated to be true in Lake Shore's alternative petition and the Maynard consolidated motion.

Lehnhausen here, in truth, urges only that corporations should be subject to Illinois' personal property tax. This is exactly what Lehnhausen urged before the Illinois Supreme Court. The judgment of the Illinois Supreme Court from which Lehnhausen seeks this Court's review, does, without question, hold that corporations are

subject to Illinois' personal property tax. Petitioner Lehnhausen prevailed below. The relief he sought has been granted by the Court below. He has been accorded full relief.

This Court can accord petitioner Lehnhausen no further relief.

This is true for the reason that petitioner Lehnhausen takes no position pertaining to the comprehension or confinement of the term "individuals" as representative of either "all persons other than corporations" or only as to "certain persons other than corporations".

This emerges from Lehnhausen's amended petition for certiorari in which petitioner Lehnhausen asks this Court to determine for itself the extent of the definition of the term "individuals". In this regard petitioner Lehnhausen takes no position before this Court, as, indeed, he took no position before the Illinois Supreme Court, as to the scope or refinement of that term. Lehnhausen, on page 41 of his amended petition for writ of certiorari, attempts here, as he attempted below, to divest himself of the responsibility of advocacy due both this Court and the Supreme Court of Illinois. Petitioner Lehnhausen merely poses the problem to this Court and requests this Court to assume the full responsibility to construe and determine which of two "probables" this Court might deem appropriate. Petitioner Lehnhausen on page 41 of his petition for writ of certiorari requests he be accorded relief by this Court as follows:

> "This petitioner respectfully submits that either the dissenting opinion of Justice Davis was correct, or that the decision of Judge Donovan in the *Shapiro* case was correct".

These petitioners respectfully submit that petitioner Lehnhausen misunderstands the jurisdiction of this

Court in such regard. The doubt and apprehension demonstrated by petitioner Lehnhausen as to which of these two "probables" is applicable here, is not soluble by this Court. Petitioner's uncertainty, at best, could only accord him the entry by this Court of its order of remandment to the Supreme Court of Illinois for that Court to make that determination. The relief Petitioner Lehnhausen seeks in this Court is not available to him.

These petitioners respectfully submit that their obligation to this Court and the advocacy commensurate with the stature of the procedural and substantive federal and non-federal issues inherent in cases of this nature, and particularly in this case, compel the foregoing observations.

These petitioners respectfully submit that this Court should decline the issuance of its writ of certiorari to petitioner Lehnhausen.

In this regard, and subject to the same observations pertaining to petitioner Lehnhausen, is the *amicus curiae* brief filed by Richard B. Ogilvie, Governor of the State of Illinois, *pro se.*

That brief requests the same relief sought by the petition for certiorari filed by petitioner Lehnhausen. That brief neither affords nor urges any definition of the term "individuals" helpful to this Court, pertinent to the issues before this Court, nor does it demonstrate entitlement to the relief it seeks.

CONCLUSION

Petitioners respectfully submit that the foregoing reasons compel the entry by this Court of its orders dismissing Lake Shore's appeal and denying Lake Shore's petition for writ of certiorari, in Case No. 71-674; denying the amended petition for certiorari filed by petitioner Lehnhausen in Case No. 71-685; and dismissing the consolidated motion to strike and brief in opposition filed by Maynard, *et al.* in Cases Nos. 71-674, 71-685, and 71-691.

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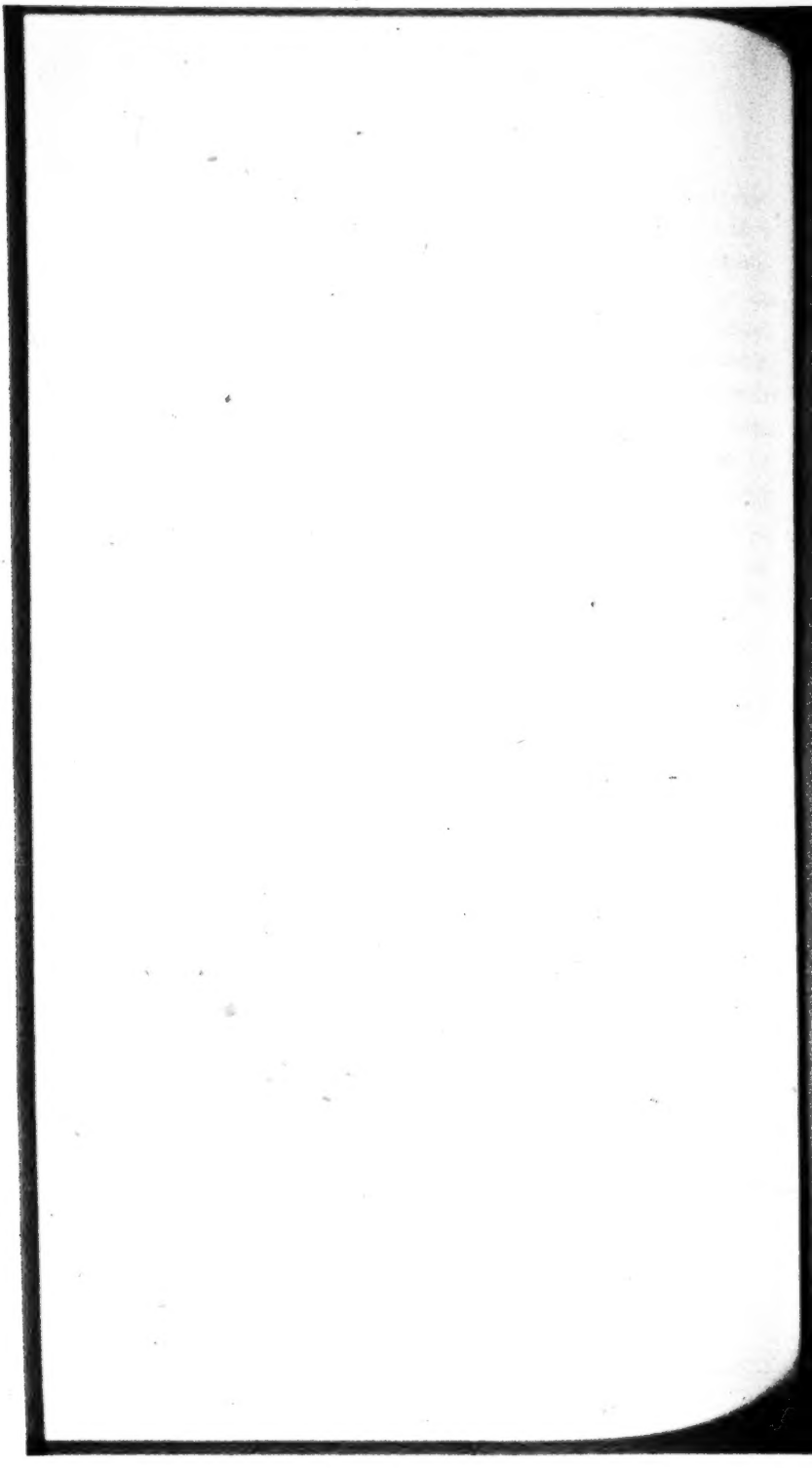

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-674

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, on its own behalf and also as representative of a class of corporations and other "non-individuals",

Appellant and Petitioner,

vs.

BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County, GEORGE M. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County, P. J. CULLERTON, County Assessor of Cook County, EDWARD J. BARRETT, County Clerk of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Appellees and Respondents.

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

SUPPLEMENTARY BRIEF IN SUPPORT OF CONSOLIDATED MOTION TO DISMISS AND BRIEF IN OPPOSITION TO GRANT OF APPELLATE JURISDICTION

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INTRODUCTION

On February 4, 1972, Mr. Michael Rodak, Jr., Chief Deputy Clerk, requested at the Court's direction, additional

responses from the parties. Mr. Diamond, one of the attorneys for the Maynard respondents, sought information about that letter. He was informed by Mr. Rodak that the Court wished clarification of the role and interest of the parties. The Court also sought to know why only one response to the three petitions for certiorari had been filed. This additional brief is, therefore, filed by the only respondents (now of record) explaining their position and their view of the positions of the other parties. This brief is written upon the assumption that the reader has first examined respondents' previously filed "CONSOLIDATED MOTION TO STRIKE (sic) [DISMISS] AND BRIEF IN OPPOSITION TO CASES 71-674, 71-685, 71-691".

BRIEF

This case comes before the Supreme Court by way of three separate petitions for writs of certiorari, one of which is joined with a request for appellate jurisdiction. The judgment appealed from is a decision of the Illinois Supreme Court finding a constitutional exemption to the state personal property tax federally unconstitutional. The opinion was rendered in three cases consolidated for argument. All three cases sought a determination from the Illinois Supreme Court as to the constitutionality of Article IX-A of the 1870 Illinois Constitution. In each case the defendants were the same, being officials of Cook County and an official of the State of Illinois. Throughout all of the proceeding, using varied arguments, these governmental defendants have fulfilled their statutory obligation of defending the Illinois Constitution by contending that Article IX-A was constitutional under Federal standards. Since the Illinois Supreme Court found Article IX-A to be unconstitutional, it is clear why the government defendants seek to appeal.

The other request for this Court's assumption of jurisdiction comes from a plaintiff in one of the three consolidated cases (*Lake Shore Auto Parts Co.* v. *Lehnhausen et al.*, 71-685). Lake Shore Auto Parts Co., as was pointed out in Argument III of our previous brief, structured its argument upon the validity of Article IX-A and the invalidity of a section of the Illinois Revenue Act. When the Illinois Supreme Court ruled Article IX-A unconstitutional, it destroyed Lake Shore's substantial victory at the trial court level. Lehnhausen, the Director of the Department of Local

Government Affairs, although a defendant in all three consolidated cases, chose to file his petition for a writ of certiorari in the *Lake Shore* case. Thus two of the three petitions for writs of certiorari arise out of *Lake Shore*.

The County officials were also defendants in the *Lake Shore* case but they chose to file their petition for a writ of certiorari not in *Lake Shore* but in the *Shapiro* case (*Barrett, et al.* v. *Shapiro, et al.*, 71-691). The *Shapiro* plaintiffs have not, to date, filed a response to the petitions for writs of certiorari. We are, however, informed by one of the attorneys for the *Shapiro* plaintiffs that they will indicate to the Court that they do not oppose certiorari. It is, therefore, necessary that the Court be made aware that the acquiescence of the *Shapiro* plaintiffs does not indicate a thirst for knowledge but only a lack of adverse interest to the positions of those who petition for certiorari.

This series of cases commenced when the trial court judge in *Lake Shore* ruled that the effect of the exemption of individuals from personal property taxes was to abolish the tax for all taxpayers. This decision would have resulted in an immediate loss to taxing bodies throughout the state of $250,000,000.00 per year. The only plaintiff in the *Lake Shore* case was a corporation. The interests of natural persons and other tax paying and receiving entities were not represented. Observers of that decision feared that the Illinois Supreme Court would receive the *Lake Shore* case in a flawed condition without all parties and issues properly before it.

It was felt that to present the Illinois Supreme Court with a case which did not present all issues and parties

would be to unnecessarily leave in doubt the proper interpretation of an important local revenue source.[1]

Therefore, a number of attorneys through their clients sought to bring before the Illinois Supreme Court cases which would allow a decision dispositive of the entire matter. Some of the clients had truly adverse interests while others were brought into the cases simply to represent an interest not present in the *Lake Shore* or *Maynard* cases.

For example, four of the plaintiffs in the *Shapiro* case previously sought to enter the Illinois Supreme Court by

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[1] The argument put forward by the *Maynard* petitioners in their request for original jurisdiction in the Illinois Supreme Court shows the concern felt by Illinois citizens and taxing bodies:

> "Petitioners urge this Court to grant them leave to file a Complaint for Declaratory Judgment and Other Relief as an original action involving revenue. That action, which will present only questions of law, can be consolidated with any other similar matters now before the court whether by original or appellate jurisdiction for the purposes of expedited briefing schedule and for hearing.
>
> "Such consolidated cases will cure the defect of the lack of all necessary and desirable parties in any case now before the Court and will offer to the Court parties who will present all arguments and allow for an opinion in sufficient time to avoid fiscal disruption throughout Illinois.
>
> "Wherefore, petitioners respectfully pray that they be granted leave to file their Complaint for Declaratory Judgment in this Court, that their case be consolidated with any other pertinent cases now before the Court and that all cases be submitted to the Court under an expedited briefing and hearing schedule."

The Illinois Supreme Court granted the *Maynard* parties' petition and consolidated their case with *Lake Shore* and later with *Shapiro*.

way of its original jurisdictional power. Their petition captioned *Kuba* v. *Barrett* was denied. In the interim, the *Maynard* plaintiffs were successful in bringing an original action in the Illinois Supreme Court. The Illinois Supreme Court thus had before it on appeal one case brought by a corporation (*Lake Shore*) and one case of first impression brought by a natural person and various taxing bodies (*Maynard*). The *Kuba* petitioners having been denied the right to file directly in the Illinois Supreme Court amended their petition by substituting Clemens K. Shapiro for Edward A. Kuba, Sr., adding two attorneys and dropping one from the original list of five, and filed their case in the Circuit Court of Cook County. After a whirlwind decision in Circuit Court, that case (containing plaintiffs who were representative of natural persons, partnerships and corporations) reached the Illinois Supreme Court where it was consolidated, heard and decided along with the *Lake Shore* and *Maynard* cases.

Unlike the County officer and State officer defendants, the Shapiro parties did not file a petition for rehearing in the Illinois Supreme Court. Nor did any of the *Shapiro* parties file either a timely petition for certiorari or a response to those which were filed. If the *Shapiro* parties should enter the case at this point and urge certiorari be granted, their position unless fully explained should be given little weight by the Court.

Thus, there were basically five parties in the consolidated cases heard by the Illinois Supreme Court. Three of these parties (Lake Shore, County Defendants, State defendant) have asked the Court to grant certiorari with a goal of having Article IX-A declared constitutional. The fourth party, the *Shapiro* plaintiffs, have not yet appeared and if they appear their interests will not be adverse to the parties seeking certiorari. The Maynard brief in the Illi-

nois Supreme Court was the only brief which argued that an improper classification had been created in the Illinois Constitution when "individuals" were the sole class relieved of ad valorem personal property taxation. Of the five parties who argued below, only the tax levying bodies and natural person joined together as the Maynard respondents have a real interest in supporting the decision of the Illinois Supreme Court. There is no party to this case other than the Maynard respondents who have or will present arguments to the Court in opposition to the granting of writs of certiorari or appellate relief. The inquiry of Mr. Rodak can be answered as follows:

1. All real parties at interest are now before the Court and have filed adversary briefs seeking or opposing Supreme Court review.
2. The Maynard parties are the only true respondents in this case and their previously filed brief treats with their opposition to all three petitions filed.
3. Since the arguments put forward by the Maynard parties were adopted by the Illinois Supreme Court, their briefs before this Court will adequately serve as support for that decision to stand with no need for further review.

In light of the three points set out above, it might be wondered by the Court why additional briefs were necessary in order to explain the status of the parties. Mr. Rodak is correct in stating that without further explanation the case as it comes to the Court is somewhat confusing. The confusion has been caused by the unexplained failure of the *Shapiro* plaintiffs—at least nominally respondents—to file and by the form of the order used to dispose of the three cases by the Illinois Supreme Court.

Since the Illinois Supreme Court ordered its decision implemented by the trial judges in *Lake Shore* and *Shapiro*, there was no need for an order to be entered in *Maynard*

and that original action was dismissed. Because of the form of the Supreme Court's mandate, the petitioners have filed their requests for Federal review in cases other than the *Maynard* case and have hardly mentioned its existence in their petitions. Some of the parties and amicus have sent the Maynard respondents briefs and notices "as a matter of courtesy". The Governor of Illinois, for example, did not seek our consent—though it would have been granted—to file his pro se brief. The Maynard respondents do not intend nor do the Supreme Court rules contemplate that petitions to review state Supreme Court decisions should be considered in the absence of the arguments of parties whose position prevailed below. Section 4 of Supreme Court Rule 21 is as follows:

> "All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, unless the petitioner shall notify the clerk of this court in writing of his belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the petition. All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is provided for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition."

Eugene Maynard and the four school districts who joined with him in the case consolidated with *Lake Shore* and *Shapiro* in the Illinois Supreme Court are certainly "parties to the proceeding in the court whose judgment is sought to be reviewed". As such, they are entitled to participate

in the arguments before this Court in the absence of an admission of non-interest. No petitioner has, of course, claimed that the Maynard respondents are not interested. In fact, they are the only parties with a real interest and standing to argue that the Illinois Supreme Court was so clearly right that further appeal, being a matter of discretion, should be denied.

Since the filing of our "Motion To Dismiss" the Court has accepted a pro se brief from the Governor of the State of Illinois. That brief is an excellent apologia and deserves at least a short answer.

1. In the Governor's statement of facts (p. 3), he contends that the new Illinois Constitution was written in contemplation that Article IX-A would pass. The implication is made that if Article IX-A and its exemption for the vague class of "individuals" is ruled invalid that the phasing out of personal property taxes between now and 1979 would be impaired. Our initial brief in this Court makes clear at pages 22 to 27 that the drafters of the 1970 Illinois Constitution meant only to accommodate Article IX-A in the new document if it stood a judicial test. If IX-A is ruled unconstitutional, the new Constitution provides a manner by which the legislature by general law may make reasonable classifications and exemptions as a procedure to phase out the tax prior to 1979. The state legislature need only pass a statutory exemption which through clarity of language and reasonableness of classification would escape the defects of Article IX-A. Such relief for the taxpayers of the State of Illinois is available in Springfield and need not be sought in Washington.

2. The Governor makes it quite clear in his brief that he seeks a flat reversal of this Court's decision in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389 (1928). In spite of some random cases to the contrary

—all of which the Governor cites—*Quaker City* and its predecessor cases have been the law of the United States for 90 years. The general rule enunciated by those cases is as follows:

> It is a denial of equal protection for the state to impose a property tax upon a corporate owner while exempting the identical property owned by an individual. From pages 8 to 15 of our earlier brief, we set out at length the cases both state and Federal which support that proposition. It would be most bizarre for all corporations in this country to be deprived of a historic equal protection right in a case where their interests were represented by a small auto parts firm. As was said at page 17 of our principal brief:
>
> "Any attempt to strip corporations of the constitutional protections emanating from the *Quaker City Cab* case must be made in the face of the practical results of such a decision. Courts have agreed that corporations can be compelled to pay franchise taxes and higher rate income taxes for engaging in the same businesses as non-corporate entities. Corporations have, however, for 90 years, been free of arbitrary classification in ad valorem taxation. Corporate decisions and state taxation systems and policies have been made upon this firm and basic assumption of constitutional law. To upset such law would be to make corporations non-persons for the purposes of the United States Constitution and effectively end the equal protection guarantee in the field of corporate taxation. Such a startling change of American law should hardly be the end result of one small piece of bad draftsmanship by the Illinois General Assembly."

3. Finally, Governor Ogilvie argues that discrimination in property taxation between natural persons and corporations can be justified if a rational basis can be

found for the distinction. In our principal brief we said as follows:

> "In the present case the only motivation which has been or could be suggested for the passage of Article IX-A is that the corporate taxpayer is a lucrative and easy target for taxation. The language previously quoted from Mr. Justice Schaefer's opinion is the best proof that the Illinois Supreme Court sought but was unable to find any legitimate policy motive underlying the admitted discrimination:
>
> > 'It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set.'"
>
> (p. 16)

Governor Ogilvie nowhere in his amicus brief suggests any other rational basis for the discrimination. While the Governor's argument might be politically popular, it does not merit acceptance by this Honorable Court.

Respectfully submitted,

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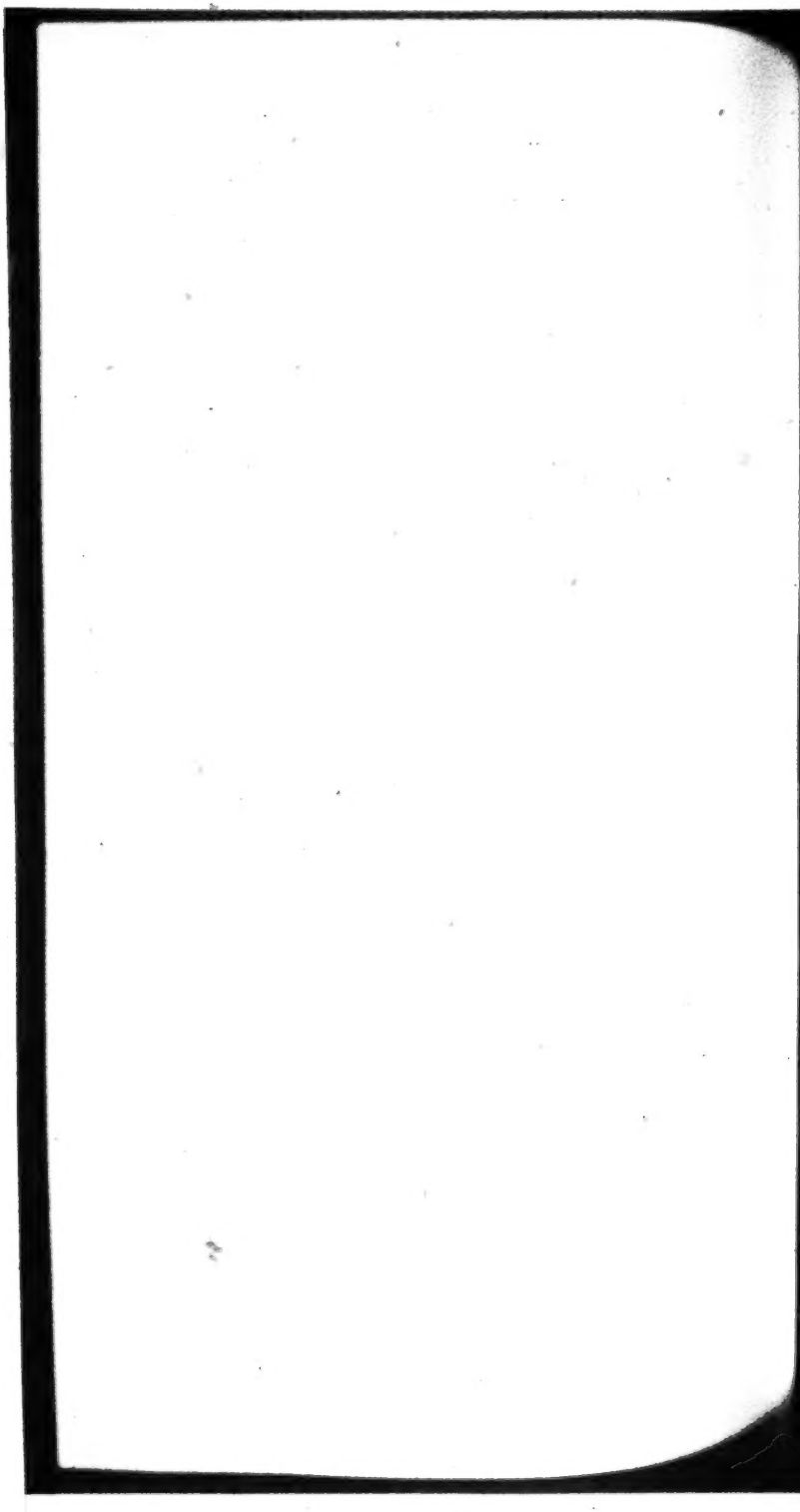

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE PETITIONER

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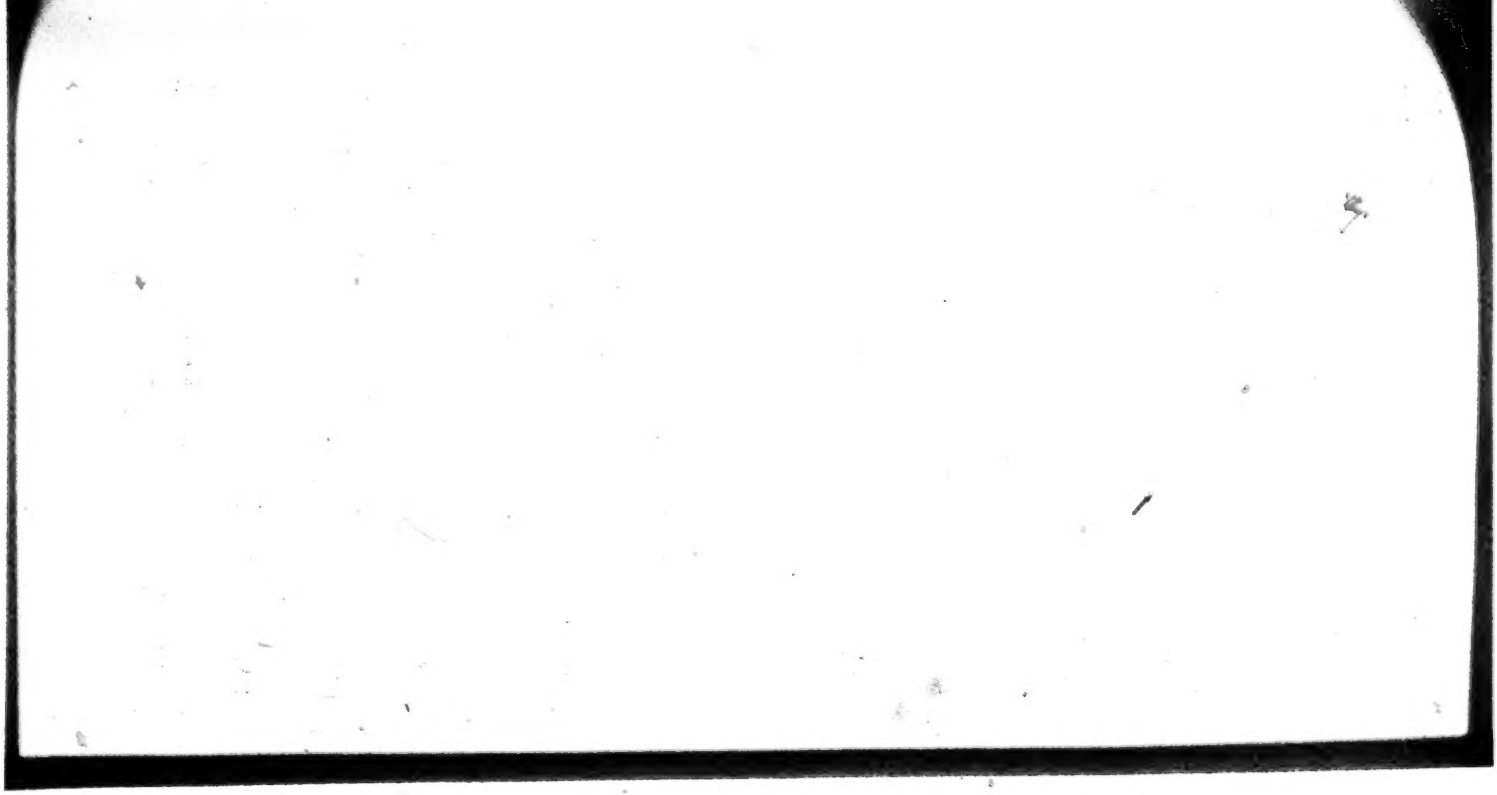

INDEX

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CONSTITUTIONAL AND STATUTORY PROVISIONS